



## **Planning Commission - Staff Report**

**Subject:** AMD2020-0002: LDR Text Amendment for Discontinued Use

**Agent/Applicant:** Teton County

**Property Owner:** n/a; County-wide

**Presenter:** Rian Rooney, Associate Long-Range Planner

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### **REQUESTED ACTION**

Proposal to amend the Teton County Land Development Regulations (LDRs), pursuant to Section 8.7.1, to define in Section 6.1.2. Classification of Uses, the discontinuance of a use, to exclude cessation of use due to the following:

- certain government actions,
- natural disaster,
- unwilful acts of the owner such as catastrophic fire or pandemic,
- and time spent maintaining, altering, replacing, or expanding a structure or site devoted to the use.

### **BACKGROUND/DESCRIPTION**

#### *PROJECT DESCRIPTION*

The arrival of the COVID-19 pandemic has meant that many businesses have not been able to operate as they would typically. Planning Department Staff recognized that this unexpected and uncontrollable pause in normal business operations could have implications for use permits throughout Teton County, many of which have expiration terms tied to the discontinuance of operations for a year or more. To prevent use permits from unintended expiration due to these and other circumstances, Staff is proposing the addition of a standard in Section 6.1.2. Classification of Uses to define "Discontinuance of Use." This definition will clarify when a use is classified as operationally discontinued, and therefore subject to possible permit expiration. Additionally, by clarifying this definition, sustained interruption of a permitted use will not be considered a discontinuance if the interruption is due to the following conditions:

- Government action other than those described in 1.9.1.I. (County condemnation of a structure)
- Natural disasters
- Actions not considered a willful act of or not a result of action by the owner or occupant, such as pandemic;
- And time spent maintaining, altering, replacing or expanding a structure or site devoted to the use.

The proposal of the enumerated exceptions is intended to support landowners by alleviating the burden of losing a use permit for cessation of business operations due to certain circumstances beyond their control. The COVID-19 pandemic and its impact on local business operations was the impetus for this amendment, but the addition of other exceptions can help to prevent unintended expiration of use permits due to future, unforeseen conditions like natural disasters. The exceptions comprising this proposed text amendment are consistent with existing "discontinuance" standards in the LDRs Section 1.9.3., Nonconforming Uses. By adding this proposed text amendment, the LDRs will set clear and consistent terms for defining discontinuance of a use for both nonconforming and permitted uses.

#### *EXISTING CONDITIONS*

The current LDRs refer to "discontinuance of use" in a few locations throughout the text, but the term is not currently defined or elaborated within Article 6, Use Standards for uses that are permitted or allowed by right. Discontinuance is addressed within the LDRs Section 1.9.3., Nonconforming Uses, under subsection *D. Discontinuance*. This subsection describes the conditions of operational discontinuance to set standards that

determine when a nonconforming use can and cannot be resumed or reestablished. The subsection lays out certain exempt conditions that may cause cessation of a use but for which discontinuance regulations will not apply. These exceptions include government actions, natural disasters, actions not considered a willful act of the owner, and time spent maintaining, altering, replacing, or expanding a structure or site devoted to the nonconforming use. These existing standards apply only to nonconformities, and there are currently no exceptions elsewhere in the LDRs for discontinuance of use.

The terms of Permit Expiration for use permits in the LDRs (Basic Use Permit, Sec. 8.4.1.; Conditional Use Permit, Sec. 8.4.2.; Special Use Permit, Sec. 8.4.3.) state that a use permit will expire if a use is operationally discontinued or abandoned for a period of one year or more. Under current regulations, permits issued with these terms would expire if operations were to stop for a year for any reason, including impacts of the COVID-19 pandemic and/or other events or conditions that are unanticipated, not the fault of the landowner or use operator, and prohibitive of continued use.

Staff performed an analysis of existing Conditional Use Permits (CUPs) in Teton County and found that there are more than 300 properties linked to one or more CUPs that were approved in the past. Of these CUPs, some are for business uses (e.g. dude ranches, bed & breakfasts, etc.) that may be especially at risk of interruption and involuntary cessation of use due to the COVID-19 pandemic.

### LOCATION

N/A; applies County-wide.

### STAFF ANALYSIS

A draft of the proposed text amendment is included as an attachment to this report.

### KEY ISSUES

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#### *KEY ISSUE 1: Relationship of proposed amendment to existing use permits*

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As a primary purpose of this amendment is to provide relief to landowners and use operators with existing use permits whose operations may be impacted by the pandemic, Staff was focused on producing an amendment that would not only impact future permits but also would protect permits that have been previously issued. Staff believes that this proposed amendment is the most efficient process to protect prior use permits, however, the amendment to formally define discontinuance and relevant exceptions may not cover all previously issued permits, depending on specific permit language and issue date. By formally defining discontinuance of use, this regulation would cover use permits issued under the standards of the current LDRs, which refer to discontinuance in the terms of expiration. The expiration terms for a Conditional Use Permit in the current LDRs are excerpted below (emphasis added):

#### “Expiration

A conditional use permit shall expire one year after the date of approval except under one of the following circumstances:

- 1. The use is commenced and ***has not been operationally discontinued or abandoned for a period of one year or more;***
- 2. A physical development permit has been issued and is active for physical development needed to commence the use; or
- 3. An alternate expiration is set through the approval of the CUP.”

The proposed amendment to define discontinuance addresses the introduction of the discontinuance provision in the current LDRs. The 1978 and 1994 LDRs do not include a discontinuance provision within the expiration terms of use permits, and permits issued under these previous LDRs likely would not be impacted by the interruption of the COVID-19 pandemic. Still, this proposed amendment may not capture expiration terms for all previously issued use permits. Those with other specified expiration terms included on the issued permit may not be covered by

the addition of this definition. While not all permits may be protected with this solution, Staff believes that the proposed amendment is the most efficient method to protect existing use permits from unintended expiration due to COVID-19 and other exceptional circumstances.

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*KEY ISSUE 2: What are the pros and cons of the proposed amendment?*

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**Pros:** Approval of this amendment defining Discontinuance of Use for permitted and allowed uses will benefit the administration of land use standards and the implementation of the Comprehensive Plan in the following ways:

- Protect existing use permit holders from inadvertent expiration of their permits due to operational limitations from the COVID-19 pandemic or future events and circumstances deemed exceptional. This should take significant burden off landowners and prevent additional costs and delays to get Conditional Use Permits reinstated through the public hearing process.
- Maintain desired community character by avoiding undue expiration of use permits that have already been issued upon being found to be compatible with the desired future character of an area.
- Align discontinuance standards for permits and conforming uses with existing discontinuance standards for nonconformities to enhance clarity and consistency of the LDRs.

**Cons:** The following impacts may result from approval of this amendment:

- The addition of exemptions to operational discontinuance could open opportunities for landowners with use permits that ought to be expired due to cessation to contest that designation. Proposed standard 6.1.2.G.3. refers to actions “not considered a willful act of...the owner or occupant that can be documented as a reason for discontinuance.” While this places a requirement on the permit holder to produce proof, this standard may leave open some room for interpretation and judgement by Staff.

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*KEY ISSUE 3: What alternative amendments were considered?*

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Staff considered other ways to protect use permit holders from undue expiration due to the COVID-19 pandemic. One alternative that was originally proposed was to modify the expiration terms of use permits in Division 8.4. of the LDRs to include the proposed exceptions. While this solution would have changed the standards and regulations on use permits issued in the future under that effective amendment, Staff does not believe that this change would apply to those permits which have previously been issued –those about which this amendment is concerned—because they are subject to the language on the issued permit. This amendment, then, could work forward but not backward.

## **STAKEHOLDER ANALYSIS**

### *PUBLIC COMMENT*

Since the proposed amendment is not specific to a single site or localized area, there was no requirement for neighborhood meetings, posted notice nor neighborhood notices. This item was noticed in the legal section of the JH News and Guide as required by the LDRs. No formal or written public comment has been received by Planning Staff as of the completion of this staff report on July 6<sup>th</sup>, 2020.

Staff mailed notice of the proposed amendment to property owners holding Conditional Use Permits (CUPs) as a courtesy, although it was not required to do so. Staff did receive several phone calls in response to the letter sent to CUP holders, generally regarding clarification. None of the phone calls included comments opposed to the proposed text amendment.

## LEGAL REVIEW

Graham

## RECOMMENDATIONS

### PLANNING DIRECTOR RECOMMENDATION

The Planning Director recommends **APPROVAL** of **AMD2020-0002**, as presented in the draft dated June 4, 2020, with no conditions based on the findings recommended below.

### PLANNING DIRECTOR RECOMMENDED FINDINGS

Pursuant to Section 8.7.1.C of the Land Development Regulations, the advisability of amending the text of these LDRs is a matter committed to the legislative discretion of the Board of County Commissioners and is not controlled by any one factor. In deciding to adopt or deny a proposed LDR text amendment the Board of County Commissioners shall consider factors including, but not limited to, the extent to which the proposed amendment:

#### 1. Is consistent with the purposes and organization of the LDRs;

Division 1.3: Purpose and Intent: Based on the legislative discretion of the Board of County Commissioners, these LDRs are in accordance with the Jackson/Teton County Comprehensive Plan. Their purpose is to implement the Jackson/Teton County Comprehensive Plan and promote the health, safety, and general welfare of the present and future inhabitants of the community with the intent listed below.

1.3.1. Implement the Community Vision: Preserve and protect the area's ecosystem in order to ensure a healthy environment, community, and economy for current and future generations.

#### 1.3.2. Implement the Common Values of Community Character

##### A. Ecosystem Stewardship

1. Maintain healthy populations of all native species and preserve the ability of future generations to enjoy the quality natural, scenic, and agricultural resources that largely define our community character.
2. Consume less nonrenewable energy as a community in the future than we do today.

##### B. Growth Management

1. Direct future growth into a series of connected, Complete Neighborhoods in order to preserve critical habitat, scenery and open space in our Rural Areas.
2. The Town of Jackson will continue to be the primary location for jobs, housing, shopping, educational, and cultural activities.

##### C. Quality of Life

1. Ensure a variety of workforce housing opportunities exist so that at least 65% of those employed locally also live locally.
2. Develop a sustainable, vibrant, stable and diversified local economy.
3. Residents and visitors will safely, efficiently, and economically move within our community and throughout the region using alternative modes of transportation.
4. Timely, efficiently, and safely deliver quality services and facilities in a fiscally responsible and coordinated manner.

#### 1.3.3. Implement the Illustration of Our Vision

- A. Achieve the desired future character identified for each Character District.
- B. Implement the policy objectives for each Character District.
- C. Achieve the character-defining features identified for each Subarea.

#### 1.3.4. Predictable Regulations, Incentives, and Allowances

- A. Ensure standards are consistently applied to similar applications and circumstances.
- B. Ensure landowners, the public, and decision-makers know the amount, location, and type of growth to expect.

*C. Use data analysis and best practices to inform standards and implement the adaptive management philosophy of the Growth Management Program.*

**1.3.5. Coordination Between Jurisdictions**

*A. Implement the joint Town/County Vision through coordinated, supportive actions.*

*B. Maintain a common structure, format, and definitions in Town and County LDRs.*

*Div. 1.4. Organization of the LDRs:* *These LDRs constitute the County's zoning and subdivision regulations. They have two organizing principles. Primarily, they are organized by zone in order to implement and emphasize the community's character-based planning approach. Secondly, to provide ease of use, they are organized to answer three questions:*

- What can be built or physically developed?*
- What uses are allowed?*
- How can the land be developed or subdivided?*

**Can Be Made.** Defining discontinuance of use and relevant exceptions adds predictability and clarity for users of the LDRs, use permit holders and applicants. The provision of exceptions for circumstances causing cessation of use beyond a landowner's control can help to add stability to and maintain diversity in the local economy in light of this current crisis and future ones. It also can help to preserve community character by protecting existing local businesses from additional interruptions due to the pandemic and other disasters.

*2. Improves the consistency of the LDRs with other provisions of the LDRs:*

**Can Be Made.** Defining discontinuance of use in Article 6 improves consistency of terminology within the LDRs and adds clarity where previously discontinuance was only formally described in the nonconforming use standards. This amendment should improve consistent application of the LDRs.

*3. Provides flexibility for landowners within standards that clearly define desired character:*

**Can Be Made.** This amendment specifically adds flexibility for landowners regarding maintaining active use permits during exceptional circumstances. Conditional Use Permits which have previously been reviewed and approved, having been found to be compatible with desired future character for an area, will be allowed to remain active.

*4. Is necessary to address changing conditions or a public necessity and/or state or federal legislation:*

**Can Be Made.** The unexpected, emergency circumstances related to the COVID-19 pandemic have heightened the necessity to address the expiration of use permits to protect existing businesses. The pandemic has revealed an opportunity to improve the LDRs that should be addressed to prevent the same challenges during future exceptional events.

*5. Improves implementation of the Comprehensive Plan; and*

**Can Be Made.** The Vision presented in the Comprehensive Plan integrates a balance of all three community values: ecosystem stewardship, growth management, and quality of life. Clarifications in the LDRs allow for simplified implementation of these standards. Aligning discontinuance of use regulations with the existing standards for nonconformities will help to preserve and enhance the desired community character in subareas throughout the County. The Conditional Use Permit process already provides a framework for evaluating whether a proposed use is compatible with the desired future character of an area. These clarifications in the text will protect those already vetted CUPs from expiring due to the pandemic and future uncontrollable and catastrophic circumstances.

*6. Is consistent with the other adopted County Resolutions.*

**Can Be Made.** No apparent conflict or relationship to other County Resolutions were identified by staff in this review.

### ATTACHMENTS

- Draft Amendment dated June 4, 2020

### SUGGESTED MOTION

I move to recommend **APPROVAL** of **AMD2020-0002**, as presented in the draft dated June 4, 2020, to add a Discontinuance of Use definition to the standards of Section 6.1.2. with no conditions, being able to make the findings of Section 8.7.2 as recommended by the Planning Director.

## 6.1.2. Classification of Uses (~~AMD2020-0002~~1/1/17)

### A. Definition of Use

Use means the purpose for which a site or structure is occupied or maintained. There are three categories of uses: principal, accessory, and temporary.

### B. Classification of Uses

1. Principal Use. A principal use is a use that may exist as the sole use of the property. More than one principal use may exist on a property. A principal use includes all incidental uses. Principal uses are organized into 8 categories:
  - a. Open Space Uses (Sec. 6.1.3.)
  - b. Residential Uses (Sec. 6.1.4.)
  - c. Lodging Uses (Sec. 6.1.5.)
  - d. Commercial Uses (Sec. 6.1.6.)
  - e. Amusement and Recreation Uses (Sec. 6.1.7.)
  - f. Institutional Uses (Sec. 6.1.8.)
  - g. Industrial Uses (Sec. 6.1.9.)
  - h. Transportation and Infrastructure Uses (Sec. 6.1.10.)
2. Incidental Use. An incidental use is a use that is commonly integrated into the operation of a principal use, even if the incidental use would be classified as a different use if it were separated. A use cannot be incidental if the principal use does not exist.

EXAMPLE: A cabinet contractor may have an office to run the business within its shop without the office being considered a separate use. As another example, a golf course may sell golf equipment as part of its operation without the pro shop being considered a separate retail use.
3. Accessory Use. An accessory use is a use that constitutes a minority of the use or character of the property and is secondary and subordinate to another use of the same property, but which is not an incidental use.
4. Primary Use. A primary use is a use to which an accessory use is accessory.
5. Temporary Use. A temporary use is a use established for a fixed period of time.

### C. Multiple Uses

Each use listed as a separate row in the Use Schedule shall require a permit unless the use is incidental to a permitted use or the use is exempt from a permit.

### D. Use Not Listed

Any use not specifically listed in the Use Schedule is expressly prohibited unless a similar use determination is made.

#### E. Similar Use Determination

A use not specifically listed in the Use Schedule may be considered an allowed use if the Planning Director determines the proposed use is sufficiently similar to one of the uses defined in this Division. The Planning Director's determination shall be made based upon the findings for a formal interpretation (Sec. 8.6.1.) but may be made as part of the review of a use permit application. If a use is determined to be similar, it shall be an allowed use with the same permissions and restrictions as the use to which it was determined to be similar.

#### F. Change of Use

A change of use consists of changing the use from a use classified in a particular row of the Use Schedule to a use classified in a different row of the Use Schedule. Except as provided elsewhere in these LDRs, the proposed use shall meet all standards of these LDRs. The required permit for the proposed use shall be obtained pursuant to the relevant procedure.

#### G. Discontinuance of Use

A use shall be considered operationally discontinued or abandoned if operations cease for a period of more than one year, whether or not the equipment or furniture is removed, unless cessation of the use is due to one or more of the following:

1. Government action other than those described in 1.9.1.I.
2. Natural disaster
3. Any other action not considered a willful act of or not a result of action by the owner or occupant that can be documented as the reason for discontinuance, such as catastrophic fire, pandemic, or other event which could not be reasonably anticipated and prohibits immediate reestablishment of the use.
4. Time spent maintaining, altering, replacing, or expanding a structure or site devoted to the use, provided:
  - a. All appropriate permits or approvals are obtained;
  - b. The maintenance, alteration, replacement, or expansion is completed within 18 months after commencement; and
  - c. The use is reestablished within 31 days after completion of the maintenance, alteration, replacement, or expansion.